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Supreme Court, U.S.
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No. 95-152

In The

Supreme Court of the United States

October Term, 1995

MAGDA MONTIEL DAVIS,

Petitioner,

v.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a *LA VERDAD,*

Respondents.

On Petition For Writ Of Certiorari To The Third District Court Of Appeal Of The State Of Florida

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In Respondents' Brief in Opposition ("Resp. Br."), Respondents contend that the Petition for Writ of Certiorari ("Pet.") should be denied because the state courts below correctly applied this Court's holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and that the Questions Presented in the Petition raise "claims and issues" not presented in the state courts below. Resp. Br., 18-30. Respondents are incorrect on both counts.[1]

I. RESPONDENTS' CONTENTION THAT THE QUESTIONS PRESENTED ARE NOT PROPERLY BEFORE THIS COURT IS ERRONEOUS

Contrary to Respondents' assertions, *see* Resp. Br., 27-30, Petitioner Magda Montiel Davis' claim in this litigation, from the trial court to this Court, has always been the same: that the Respondents' defamatory statements that Ms. Davis is a representative of Castro's interests in the United States and a "Castrista" are actionable, consistent with the First Amendment, because the reasonable reader, given the context in which the statements appeared and the audience to whom the publications were directed, would understand those statements to imply provably false assertions of fact. The Amended Complaint makes explicit allegations of this nature. *See* Pet., Appendix ("P. App."), 16 (Amended Complaint,

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[1] Ironically, while Respondents complain that the Petition makes factual arguments based on Respondents' defamatory publications that were not properly raised below, Resp. Br., 27-30, Respondents in a number of places in their Brief in Opposition raise matters *wholly outside the record* in a cheap attempt to prejudice the Court's evaluation of the Petition. *See id.*, 11 n.3, 11-12 n.4. Ms. Davis will ignore the substance of those matters for the purposes of this Reply.

¶¶ 19-21, 32-33). In fact, Count II of the Amended Complaint, in distinction to Count I, stated a claim for libel based upon the contextual meaning of the statements, rather than for their defamatory nature *per se*. *See* P. App., 16-17. Ms. Davis explicitly argued this position in the trial court. *See* Resp. Br., App. ("R. App."), 20a, 21a, 31a (PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS).

The Respondents moved to dismiss the Amended Complaint, relying primarily on *Milkovich*. *See* R. App., 38a-40a. Respondents argued then, as they do now, that under *Milkovich* the sued upon statements do not imply any provably false assertions of fact. *Id*. The trial court agreed, holding under *Milkovich* that "the statement that the Plaintiff is 'pro-Castro' or serves his interests, similarly constitutes an expression of political opinion and judgment which is not actionable." P. App., 4.

Thus, the issue whether Respondents' defamatory statements, in context, implied or asserted any provably false statements of fact was squarely presented and decided in the trial court.

Moreover, on appeal to Florida's Third District Court of Appeal, Ms. Davis presented the same argument in her briefs and at oral argument that she now presents here. Respondents acknowledge as much. Resp. Br., 17-18, 28-29. Yet, the Respondents did not move to strike any portion of Ms. Davis' appellate briefs on the ground that she had raised new factual assertions not raised in the trial court, as Respondents argue here. *Id.*, 27-30. instead, Respondents chose to brief and argue the appeal on the merits of the First Amendment issue. The Third District Court of Appeal, having received the parties' briefs and having heard oral argument, proceeded to decide the appeal on the merits of the First Amendment issue,

affirming the judgment of the trial court and citing *Milkovich*. P. App., 1. Notwithstanding Respondents' citation to Florida cases purporting to limit an appellant's right to argue issues on appeal to those raised at trial, Resp. Br., 29, the appellate court did not dismiss the appeal or raise *sua sponte* any objection to Ms. Davis' appellate argument. Clearly, the Questions Presented here were presented in the Third District Court of Appeal.

This is decidedly *not* a case where the Questions Presented by Ms. Davis were never raised in the courts below. To that extent, Respondents have cited inapposite cases. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (refusing to review district court's denial of costs under Fed. R. Civ. P. 54(d) for abuse of discretion when the question was never raised in the court of appeals); *U.S. v. Santana*, 427 U.S. 38, 41 n.2 (1976) (refusing to consider standing issue that Court raised *sua sponte* since Government did not raise the issue below); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to consider request to overrule *Civil Rights Cases*, 109 U.S. 3 (1883), because issue was neither raised in, nor considered by, court of appeals); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (refusing to consider question of constitutionality of state statute, which was never "raised, preserved or passed upon in the state courts below").

Rather, what Respondents object to is not that Ms. Davis has asserted a new *claim* in her Questions Presented, but that she has presented a new *argument* in support of her claim. Aside from the fact that Ms. Davis indeed raised the same argument in the Court of Appeal, this Court has expressly approved the advancement of

new arguments in support of the same claim. For example, in *Yee v. City of Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 1532 (1992), this Court rejected the respondent's contention that the petitioner could not maintain a regulatory taking argument in the Supreme Court because no regulatory taking argument had been made below. *Id.* Acknowledging that it was unclear whether the petitioners had in fact raised the argument either at trial or on appeal, the Court stated nevertheless that:

> [t]he question of whether the rent control ordinance took their property without compensation, in violation of the Fifth Amendment's Takings Clause, is . . . properly before us. Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . Having raised the taking claim in the state court, therefore, petitioners could have formulated any argument they liked in support of that claim here.
>
> A litigant seeking review in this Court of a claim properly raised in a lower court thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. . . . The petitioner can generally frame the question as broadly or as narrowly as he sees fit.[2]

Id. (citations omitted). Thus, under *Yee*, even if Ms. Davis had not made the same argument in the Court of Appeal that she renews here, this Court could still entertain that

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[2] This Court eventually refused to consider the regulatory taking issue, not because it had not been raised in the courts below, but because that issue was not "fairly included" in the question presented, which dealt only with physical takings. *Id.* at 1533.

argument since Ms. Davis presented the federal question below and her claim remains the same.

Moreover, this Court has never adhered to an inflexible rule that claims or issues not presented below cannot be presented to the Supreme Court, as two of the cases that Respondents cite recognize. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980) (considering Government's theory presented for first time in *brief on the merits* that no unconstitutional seizure occurred); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (vacating judgment below and remanding based on Supremacy Clause challenge to Illinois statute, although petitioners previously based their claims only on Equal Protection grounds below); *see also Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (addressing constitutional issue on the merits that was not presented in the petition for certiorari, in the district court, or the court of appeals, but that had been squarely presented, fully briefed, and was an important, recurring issue). This Court need not go so far. The federal question in the instant Petition,[3] as well as Ms. Davis' claims, have been the same since this case was in the state trial court. The same argument presented in Ms. Davis' Petition was briefed and argued in the Court of Appeal immediately below. Consequently, the Questions Presented are properly before this Court.

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[3] Although respondents make much of Florida cases purportedly limiting the issues that may be raised on appeal, those cases are not dispositive as to whether the federal questions presented in the instant Petition were adequately raised below. "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969).

II. RESPONDENTS' ASSERTION THAT THE COURTS BELOW CORRECTLY APPLIED *MILKOVICH* TO INSULATE "POLITICAL NAME-CALLING" FROM STATE LIBEL LAW IS ERRONEOUS

This Court has never held that "policial name-calling" is immune *per se* under the First Amendment from the reach of state libel laws. To the contrary, simply because "speech is used for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the orderly manner in which economic, social, or political change is to be effected." *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964). Nor has this Court abandoned candidates for public office to political antagonists, leaving them completely without redress for defamatory speech. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). Hence, entry into the political arena does not require a candidate for public office to forfeit all protection from defamatory speech, even if it is somehow "political."

But under Respondents' position, defamatory speech of a colorably "political" nature is always immune from redress. In their words, "*Milkovich* reaffirms . . . that political 'name-calling,' however defamatory, is not actionable, nor are expressions which inherently invoke political judgments, as opposed to those stating or implying facts." Resp. Br., 22. Yet, *Milkovich* had nothing to do with political name-calling, nor did this Court recognize in that case a legal distinction between political "opinions" and verifiably false facts. Rather, the case stands only for the proposition that "opinions" do not constitute a category of protected speech under the First Amendment because even "opinions" may imply verifiably false facts. *Milkovich*, 497 U.S. at 18.

The Respondents' defamatory statements[4] that Ms. Davis is a "Castrista" and represents Castro's interests in the United States *did*, however, imply verifiable facts. The Respondents knew that such statements would impute to Ms. Davis well-defined political affiliations, membership in certain organizations, and beliefs in contradiction to the Cuban community in Miami. P. App., 13 (Amend. Compl., ¶¶ 19-21). As shapers of public opinion, the Respondents clearly tried closely to associate Ms. Davis with Castro, knowing that to do so would irreparably damage her reputation and standing in South Florida. The Respondents falsified and fabricated "facts" to show that Ms. Davis is an agent of Castro, such as that one of Ms. Davis' husband's clients is Castro's "most visible agent in Miami;" that another client "belongs to Castro's government;" that her husband's "law firm was chosen by the government of the tyrant Fidel Castro to defend the interests of Aruca's Marazul;" and that Ms. Davis "is a member of her husband's law firm," "a partner and wife of a lawyer trusted by Fidel Castro." Pet., 4-6. Respondents tried to give the foregoing "facts" an air of authenticity, couching their carefully chosen rhetoric in the language of objective, investigatory reportage, and implying that they culled the information from extrinsic sources. *Id.*, 12. "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [Ms. Davis was closely linked to Castro]. Nor does the general tenor of the article negate this impression." *Milkovich*, 497 U.S. at 21.

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[4] That Respondents' publications defamed Ms. Davis has never been in dispute. *See* Pet., 14.

Contrary to Respondents' interpretation, *Milkovich* itself suggests that just this sort of publication is subject to a defamation action: "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 18-19; *see also Moldea v. New York Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994) ("[D]efamatory assessments based on incorrect 'facts' stated by the speaker are also actionable. Thus, the statement 'In my opinion Jones is a liar because he cheats on his taxes' could be libelous if the allegation of cheating were untrue."), *modified on other grounds sub nom. Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994).

Yet Respondents insist that this case is indistinguishable from "name-calling cases in which speakers, in a moment of frustration or hostility, hurled a "loose" and "figurative" epithet, such as "Nazi" or "fascist," that did not imply any actual facts about the object of derision. *See* Resp. Br. at 22-26. Respondents, for example, rely heavily on dicta in *Lasky v. American Broadcasting Cos., Inc.*, 606 F. Supp. 934, 940 (S.D.N.Y. 1985), to provide examples of non-actionable "political" epithets. Resp. Br., 22-23. In that case, two individuals were "engaged in a shouting match in which Lasky called Mundel a communist and she called him a Nazi." 606 F. Supp. at 940 (cited in Resp. Br., 23). In that context, no reasonable person would take seriously that either Lasky or Mundel had intended to prove that the other was actually a Nazi or communist. (In any event, *Lasky* did not concern tort liability for those statements. *See id.* at 940).

Lasky is similar to a line of this Court's cases which Respondents contend the trial court correctly applied to dismiss the Amended Complaint. Resp. Br., 25-26. In

those cases, this Court held non-actionable defamatory publications which, in context, could not reasonably have been interpreted as implying actual facts about the defamed party. *See Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (reversing because "[i]t is simply impossible to believe" that a reasonable reader would have interpreted the accurate and full report of a city council meeting as charging Bresler with "blackmail"); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 285 (1974) (reversing because "[i]t is similarly impossible to believe that any reader of the Carrier's Corner would have understood the newsletter to be charging the appellees with . . . treason"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 45, 50 (1988) (reversing where ad parody "could not reasonably have been interpreted as stating actual facts about the public figure"). Surely, Respondents do not seriously contend that their publications could not reasonably be interpreted as stating actual facts about Ms. Davis. The Respondents' articles distorted, falsified, and fabricated "facts" in a deliberate effort to intimidate Ms. Davis and ignite violent reprisals against her in her campaign for federal public office. Based on the representations of "fact" that *La Verdad's* articles laid out, a reasonable reader knowing nothing about Ms. Davis could easily interpret those "facts" as indicating Ms. Davis' close association with Castro. Based on the immediate, hostile reaction that the articles engendered, many readers no doubt did interpret the defamatory statements as representations of actual facts. *Bresler, Letter Carriers,* and *Falwell* have no application this case.[5]

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[5] The Respondents also rely on *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985), to show that "political opinions" are not actionable. Resp. Br.,

In sum, *Milkovich* did not establish that "political name-calling" is not actionable under the First Amendment, nor do Respondents' other cases support that position. In the context of the articles in which they appeared, the Respondents' defamatory statements could reasonably have been, and were, interpreted as stating verifiably false facts about Ms. Davis. Moreover, the Questions Presented are properly before this Court, and the Court should grant the Petition to resolve them.

Respectfully submitted,

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24. In that case, a Marxist professor alleged that he had been defamed by an editorial that stated that he was "an outspoken proponent of political Marxism." The obvious distinction from this case, however, is that the professor was a widely known and self-professed Marxist. The court affirmed summary judgment for the defendant because "the trier of fact would have the dubious task of trying to distinguish 'political Marxism' from 'non-political Marxism,' whatever that may be." *Id.* at 987. But in doing so, the court explicitly cautioned that it was *not* holding that terms such as " 'fascist' cannot be statements of fact in any context," *id.* at 980 n.20, as Respondents apparently believe.